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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

IN RE PACIFIC FERTILITY CENTER
LITIGATION

This Document Relates to:
No. 3:18-cv-01586
(A.B., C.D., E.F., G.H., and I.J.)

Master Case No. 3:18-cv-01586-JSC

**PLAINTIFFS' MOTION IN LIMINE NO. 7:
INSURANCE COVERAGE**

Pretrial Hearing: April 29, 2021
Time: 2:00 p.m.
Judge: Hon. Jacqueline S. Corley
Place: Courtroom F, 15th Floor

Trial Date: May 20, 2021

Defendant Chart intends to argue at trial that the March 4th incident was the fault of Pacific Fertility Center, Pacific MSO, and Prelude Fertility. In support of that argument, Chart appears ready to introduce trial exhibits evidencing general and professional liability insurance policies and indemnification agreements benefitting all three entities, including:

- A renewal application for liability coverage by Pacific MSO’s Laboratory Director, Dr. Joseph Conaghan (Trial Ex. 381, MSO014166–176);
- A “MANAGEMENT SERVICES AGREEMENT” between Pacific Fertility Center and Pacific MSO requiring each party to carry liability insurance covering itself and the other, and to indemnify the other for its own acts (Trial Ex. 505, PRELUDE000332, 343-345);
- A “TISSUE STORAGE MANAGEMENT SERVICES AGREEMENT” between Pacific Fertility Center and Prelude requiring each party to carry liability insurance, and to indemnify the other for certain of its own acts (Trial Ex. 506 at 1, 3–4, PRELUDE000369, 371–372); and
- An “INITIAL EMBRYO STORAGE MANAGEMENT SERVICES AGREEMENT” between PFC and Pacific MSO requiring each party to carry liability insurance, and to indemnify the other for certain of its own acts (Trial Ex. 507 at 1, 3–4, PRELUDE000427, 429–430).

Rule 411 of the Federal Rules of Evidence proscribes the use of this type of evidence to establish that these non-parties acted negligently or wrongfully — the only purpose for which it could conceivably be offered here. *See* Fed. R. Evid. 411. Although Rule 411 generally applies to insurance, the Ninth Circuit has found it applies to indemnification as well. *See In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1014 (9th Cir. 2008) (“Evidence of indemnification is generally inadmissible”); *see also Perrin v. Anderson*, 784 F.2d 1040, 1047–48 (10th Cir. 1986).

This Rule “has its basis in the belief that such evidence is of questionable probative value or relevance” and “vindicates the feeling that knowledge of the presence or absence of liability insurance would induce juries to decide cases on improper grounds.” *Burke v. Regalado*, 935 F.3d 960, 1021 (10th Cir. 2019) (quoting *Charter v. Chleborad*, 551 F.2d 246, 248 (8th Cir. 1977) and Fed. R. Evid.

411, advisory committee’s notes to 1972 proposed rules). Absent Rule 411’s limitations, “[i]nstead of focusing the jury’s attention on the injury actually suffered by the plaintiff, we would be subjecting the jury to a flurry of largely irrelevant assertions and counter-assertions concerning who may or may not be financially harmed by a particular award.” *Moore v. Hartman*, 102 F. Supp. 3d 35, 141 (D.D.C. 2015) (quoting *Larez v. Holcomb*, 16 F.3d 1513, 1519 (9th Cir. 1994)); *see also Cmty. Ass’n Underwriters of Am., Inc. v. Queensboro Flooring Corp.*, 2016 WL 1728381, at *10 (M.D. Pa. Apr. 29, 2016) (noting the possible “improper inference” that an insured party has “deep pockets”).

In addition, Rule 411 “promotes a general public policy of favoring insurance coverage, as both insurers and insured are encouraged to enter into contracts of insurance with the implied promise that they will not, as a result of their forethought, be subject to an inference of carelessness.” *Vargas-Alicea v. Cont’l Cas. Co.*, 2019 WL 1453070, at *6 (D.P.R. Mar. 31, 2019) (citing 2 Weinstein’s Federal Evidence; Sec. 411.03(1), p. 411-5); *see Bacho v. Rough Country, LLC*, 2016 WL 4607880, at *8 n.4 (N.D. Ga. Mar. 17, 2016) (“evidence that [defendant’s] insurer recognizes the increased risk of serious accidents posed by lift kits ... is inadmissible to show liability”).

Because Rule 411 prohibits such uses and because there is no other, permissible use for evidence of non-parties’ insurance policies and indemnity agreements in this case (*e.g.*, “proving a witness’s bias or prejudice or proving agency, ownership, or control”), the evidence should be excluded at trial. Fed. R. Evid. 411.

Dated: April 14, 2021

Respectfully submitted,

By: /s/ Amy M. Zeman

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

IN RE PACIFIC FERTILITY CENTER
LITIGATION

Case No. 3:18-cv-01586-JSC

**DEFENDANT CHART INC.'S
OPPOSITION TO PLAINTIFFS'
MOTION IN LIMINE NO. 7:
INSURANCE COVERAGE**

Hearing: April 29, 2021
Time: 2:00 p.m.
Judge: Hon. Jacqueline Scott Corley
Place: Courtroom F, 15th Floor
Trial: May 20, 2021

1 **I. INTRODUCTION**

2 Plaintiffs’ motion *in limine* No. 7 requests the Court to exclude all evidence related to
 3 insurance or indemnity agreements of Pacific Fertility Center (PFC), Pacific MSO, and Prelude
 4 Fertility. The request is overbroad and is based on a flawed premise: “the only purpose for which
 5 [evidence of general and professional liability insurance and indemnification agreements] could
 6 conceivably be offered here” is to show a party acted negligently or wrongfully. (Pls.’ MIL No. 7
 7 at 1:19-21.) Chart agrees that under Rule 411, “[e]vidence that a person was or was not insured
 8 against liability is not admissible to prove whether a person acted negligently or otherwise
 9 wrongfully.” Fed. R. Evid. 411. However, the Rule does not provide a blanket exclusion of this
 10 type of evidence but, instead, provides non-exhaustive examples of when evidence of insurance is
 11 admissible: “proving a witness’ bias or prejudice or proving agency, ownership, or control.” *Id.*
 12 Thus, while Chart does not intend to introduce “insurance” evidence to prove negligence or
 13 wrongful acts, the Court should deny Plaintiffs’ request to the extent it attempts to exclude all such
 14 evidence even for admissible purposes.

15 **II. ARGUMENT**

16 “Evidence regarding insurance coverage ‘is admissible for any relevant purpose other than
 17 the prohibited purpose of showing negligence or wrongful conduct.’” *United Food Grp., LLC v.*
 18 *Cargill, Inc.*, No. CV 11-7752 SS, 2014 WL 12925563, at *2 (C.D. Cal. Nov. 14, 2014) (citing
 19 *DSC Commc’ns Corp. v. Next Level Commc’ns*, 929 F. Supp. 239, 246 (E.D. Tex. 1996)). Courts
 20 deny motions requesting broad exclusion of insurance evidence where the evidence may become
 21 admissible at trial, *e.g.*, where the plaintiff opens the door for its introduction, and where the
 22 evidence can show bias, prejudice, agency, ownership, or control. *See Berman v. Knife River*
 23 *Corp.*, No. 5:11-CV-03698-PSG, 2014 WL 12647750, at *2 (N.D. Cal. Aug. 15, 2014) (denying
 24 defendants motion to exclude insurance evidence, even where plaintiff did not oppose, because the
 25 evidence may be admissible for another purpose and stating “the court is not persuaded a broader
 26 prophylactic bar is warranted at this time [and] will consider any appropriate objection raised
 27 during trial.”); *see also Moroccanoil, Inc. v. Marc Anthony Cosms., Inc.*, No. CV 13-2747-DMG
 28 AGRX, 2014 WL 5797541, at *7 (C.D. Cal. Oct. 7, 2014) (granting defendant’s motion to exclude

1 insurance evidence, but only to the extent the plaintiff “seeks to admit evidence of [defendant]’s
 2 liability insurance policy to show wrongdoing.”); *Est. of Nunez by & through Nunez v. Cty. of San*
 3 *Diego*, No. 316CV01412BENMDD, 2019 WL 2238655, at *4 (S.D. Cal. May 23, 2019) (granting
 4 defendants’ motion to exclude insurance evidence insofar as it was inadmissible for the parties
 5 case-in-chief, where plaintiff did not oppose motion “unless Defendants open the door, *e.g.*, by
 6 introducing evidence of personal financial hardship or burden.”).

7 Here, there are a number of potential avenues through which the door could be opened for
 8 introducing insurance or indemnity agreement evidence at trial, including any statement or
 9 testimony by a PFC, Pacific MSO or Prelude Fertility representative that Chart carries insurance
 10 coverage, or that they have suffered financial hardship as a result of the subject incident. There
 11 could also be testimony regarding any dispute about which entity had ownership or control over
 12 the subject tank or controller, or an indemnity agreement could be the basis for biased testimony
 13 with respect to the fault of one of those parties or damages owed. Plaintiffs have little to no control
 14 over how these third parties will testify and should not be able to limit Chart in the event those
 15 parties open the door, or whether Chart decides to use the evidence for an admissible purpose with
 16 respect to those third parties.

17 Ultimately, the Court should not enforce a complete exclusion of insurance evidence at this
 18 stage where there are a number of ways it could become admissible with respect to PFC, Pacific
 19 MSO, and Prelude Fertility. Further, it is unclear (and Plaintiffs have made no argument) how
 20 evidence of insurance or indemnity agreements between those non-parties, if introduced at trial,
 21 would unfairly prejudice Plaintiffs. *See Burke v. Regalado*, 935 F.3d 960, 1021 (10th Cir. 2019)
 22 (finding trial testimony about insurance of a third party did not prejudice defendants where
 23 defendants could not explain how they were prejudiced, and the record did not demonstrate
 24 prejudice). Indeed, no unfair prejudice would result to Plaintiffs in this case. Plaintiffs’ motion
 25 should be denied to the extent it attempts to exclude non-prohibited, admissible insurance or
 26 indemnity agreement evidence at trial.

27 **III. CONCLUSION**

28 WHEREFORE, Defendant Chart, Inc. respectfully requests this Honorable Court to deny

1 Plaintiffs' motion *in limine* No. 7 as set forth above, and for any other relief this Honorable Court
2 may deem equitable and just.

3
4 Dated: April 15, 2021

Respectfully submitted,

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